

*United States Court of Appeals
for the Second Circuit*



APPENDIX

ORIGINAL

DOCKET No. 76-1103

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1103

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PJS

UNITED STATES OF AMERICA,
Appellee,

-against-

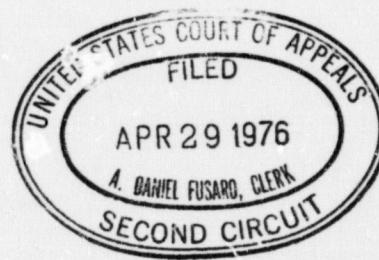
MICHAEL CHARLES VESCERA, JR.
and ANTHONY FERRANTE,

Defendant-Appellants.

On Appeal From the United States District
Court for the Eastern District of New York

APPENDIX IN BÉHALF OF APPELLANTS

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1 9 Nadler - direct

2 before, Agent Nadler?

3 | **A** **No.**

4 Q " W, what information did this informant give
5 you? "

6 A The information that he furnished me was to the
7 effect that Anthony Ferrante and others were operating a
8 drop at a building, Metropolitan and Flushing Avenue in
9 Brooklyn, New York.

10 Q Now, could you please explain for the record
11 what a drop is?

A drop is an area where stolen merchandise
is usually stored.

14 Q After you received this information what, if
15 anything, did you do?

16 A We conducted an investigation --

17 MR. WEISSWASSER: I object to "we" if your
18 Honor please.

19 MR. SCOTTI: If the witness will be permitted
20 to answer the question and then the Government would
21 determine who the "we" were.

22 THE COURT: Along those lines, I will permit
it. The objection is overruled.

24 A Myself and other agents conducted an investiga-
tion at this site.

1 10 Nadler - Direct

2 Q What kind of investigation?

3 A We located the area inwhich the informant advised
4 us about.

5 Q What area was that?

6 A That was at 1956 Flushing Avenue.

7 Q When you say "we," yourself and other agents,
8 can you identify some of those ether agents?

9 A Special Agent Gerard M. Collins, Special Agents
10 Armstrong, Edwards, Bolling.

11 Q Would it be fair to say that the agents would
12 vary from time to time?

13 A That's right.

14 Q Would you explain this investigation which you
15 conducted?

16 A We conducted a spotcheck at this warehouse and
17 from time to time we noted some activity there.

18 Q All right.

19 Now, I take it when you say "spot check" you
20 mean snot survillance?

21 A Yes.

22 Q What activity did you note there?

23 A Also, in the latter part of October I surveilled
24 a car from the Elks Bar on Flushing Avenue in Brooklyn.

25 MR. EVSEROFF: Your Honor, I respectfully object.

1 Nadler - direct

35

2 Dumpster, what happened?

3 A We surveilled -- Agent Collins and myself
4 surveilled the truck back to 1956 Flushing Avenue.

5 Q Did the truck --

6 A And discontinued the surveillance.

7 Q What did the truck do when it got to the
8 vicinity of the premises?

9 A It went into the warehouse in 1956.

10 Q What if anything did you do after that?

11 A Agent Collins and myself went back to the Dempsey
12 Dumpster to determine what was placed into the trash receptacle.13 Q Approximately how long was it from the time
14 that you broke off your surveillance at 1956 Flushing Avenue,
15 after the green step van had returned, to the time you arrived
16 back at the dumpster?

17 A Between five and 10 minutes.

18 Q And what if anything happened when you arrived
19 back at the dumpster?20 A We looked at the material and found out that
21 labels had been cut out of the cartons; however, we did find
22 some labels. One in particular was Tioga Industries.23 Q Did you conduct any investigation concerning
24 the label you found, Tioga Industries?

25 A Yes. I telephonically contacted the New York

1 Nadler - direct

2 office, in particular, my squad, to determine whether or not
3 there had been any theft with regards to any Tioga Industry
4 material.

5 I was informed that on October 22, 1972, a truck
6 containing Tioga material had been hijacked in Brooklyn. →

7 Q Did you conduct any investigation to determine
8 whether or not the cartons you found in the dumpster on
9 November 10th were in fact part of the shipment of Tioga
10 materials that were stolen?

11 A From my understanding, yes, it was.

12 MR. WEISSWASSER: I object to his understanding.

13 MRS. ROSNER: Objection.

14 THE WITNESS: Yes.

15 THE COURT: What's the objection?

16 MR. WEISSWASSER: Obviously he's modifying his
17 language. I don't know what that means, to his under-
18 standing. If he conducted an investigation, either
19 found out certain things or he didn't find them out.

20 THE COURT: If he had said "certainty," you
21 would have objected, because he should be uncertain.
22 But under the circumstances, the objection is over-
23 ruled.

24 MRS. ROSNER: Your Honor, I object unless he's
25 testifying from personal knowledge, your Honor, because

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mm/nc

Nadler

A F T E R N O O N S E S S I O N

3 ROBERT C. NADLER , having
4 been previously duly sworn by the Clerk of the Court,
5 resumed the stand and testified further as follows:

6 THE COURT: I will take the attorneys at side
7 bar at this time.

8 (Side bar discussion out of the hearing
9 of the courtroom spectators as follows:)

10 THE COURT: I understand that the records that
11 the Court requested are not here.

12 MR. SCOTTI: That is correct.

13 THE COURT: Will you explain it?

14 MR. SCOTTI: On going back to the office and
15 discussing it further with Agent Nadler and his calling
16 his office in New York, I was apprised that the
17 informant file would not be allowed to leave the FBI
18 premises nor would copies of the file be allowed to
19 leave the premises for the purpose of Mr. Nadler
20 testifying.

21 Of course, this would not include a Court
22 Order for the production of the records for an in
23 camera inspection. It was not my understanding that
24 that is what your Honor intended and on my authority
25 I told them not to get them and I will take full

1 **2** **3** **4** **5** **6** **7** **8** **9** **10** **11** **12** **13** **14** **15** **16** **17** **18** **19** **20** **21** **22** **23** **24** **25** **26** **27** **28** **29** **30** **31** **32** **33** **34** **35** **36** **37** **38** **39** **40** **41** **42** **43** **44** **45** **46** **47** **48** **49** **50** **51** **52** **53** **54** **55** **56** **57** **58** **59** **60** **61** **62** **63** **64** **65** **66** **67** **68** **69** **70** **71** **72** **73** **74** **75** **76** **77** **78** **79** **80** **81** **82** **83** **84** **85** **86** **87** **88** **89** **90** **91** **92** **93** **94** **95** **96** **97** **98** **99** **100** **101** **102** **103** **104** **105** **106** **107** **108** **109** **110** **111** **112** **113** **114** **115** **116** **117** **118** **119** **120** **121** **122** **123** **124** **125** **126** **127** **128** **129** **130** **131** **132** **133** **134** **135** **136** **137** **138** **139** 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2 responsibility for that.

THE COURT: Is there any reason for that?

4 MR. SCOTTI: The reason is strictly a security
5 reason. They don't allow informant records out.
6 That's number one.

Number two, Mr. Nadler does have certain
dates regarding his contact with the informant. How-
ever, at this point I would object to any further
specificity by Mr. Evseroff or any other counsel
should they choose such a line as to pinpointing
exact dates and times and maybe places or whatever
regarding Mr. Nadler's contact with the informer.
because it is my opinion these questions are not
relevant to the issues before the Court and designed
solely to disclose the identity of the informant.

17 THE COURT: Is there some reason that you feel
18 he may not be safe?

19 MR. SCOTTI: Exactly, your Honor. My informa-
20 tion is that his life would be in very serious
21 jeopardy.

MRS. POSNER: Might I make a request?

23 THE COURT: Surely.

24 MBS. ROSNER: On the last point, if the Govern-
25 ment has a good faith belief that this individual may

1 Nadler

2 be in danger, I ask that the Assistant submit an
3 affidavit in camera to be sealed and preserved stating
4 the reasons known to him why this individual may be
5 in danger.

6 While I can understand why Mr. Scotti may not
7 want that known to defense counsel he shouldn't have
8 any objection for it to be known to the Court and sealed
9 for review.

10 Agent Nadler, as I recollect, was to do several
11 things simply to refresh his recollection concerning
12 d da dates and that could be done without the records
13 leaving FBI headquarters and I request that be done.

14 THE COURT: That's one of the things he requests
15 not to be done.

16 MRS. ROSNER: Taking that point somewhat out of
17 turn, the prosecution opened the door to these questions
18 by eliciting information to support the proposition
19 that the search was legal concerning earlier tips by
20 the informant and one of the questions is, at what
21 point in time they were given and exactly what was said
22 and how it was corroborated.

23 THE COURT: For what purpose do you say these
24 are relevant?

25 MRS. ROSNER: They become relevant when

1 4
2 Nadler

3 Government introduces evidence of unreliable informant's
4 information prior to the date of the actual search.

5 THE COURT: We don't have any such thing.

6 MRS. ROSNER: The Government introduced such
7 evidence, unreliable. They take the position that
8 this individual has never given information resulting
9 in an arrest or conviction but called and without
10 indicating the basis for his knowledge, gave certain
11 information which they then corroborate and there were
12 several corroborates with the same informant which
 related to the same premises.

13 They introduced this probable cause to believe
14 there was criminal activity on the morning of November
15 15th. Taking the case from November 15th forward and
16 ignoring anything further, the Government would
17 concede there is no probable cause.

18 THE COURT: That isn't what you have here
19 exactly.

20 MRS. ROSNER: If I understand the evidence
21 and all of it is not in yet --

22 THE COURT: It is not in yet.

23 MRS. ORSNER: When the agents arrive at the
24 drop on the morning of November 15, all we know is
25 they see the 4 Gs truck pulling out and the Hertz van

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Nadler

going in and they pull the truck over. On what we have so far they need the informant and corroboration of the informant before November 15 to make their case.

THE COURT: That's your position?

MRS. ROSNER: Anything I say is the context of an opinion.

THE COURT: Well --

MRS. ROSNER: I submit they need the informant's information to establish their case. They couldn't preclude defense counsel from going into the amount of contact and what kind of contact.

He may have given information which proved to be erroneous when the agents tried to corroborate it.

THE COURT: You can ask him.

MR. SCOTTI: You can ask him and not pinpointing dates and times, etc.. I have no objection to questions asked concerning that kind of inquiry.

I feel it is completely irrelevant as to the exact dates and times of these communications. I can't see any justification to find out the identity of the informant.

MRS. ROSNER: No one is trying to do that.

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Nadler

2 Mr. Evseroff asked -- well, nobody is trying to do
3 that. I think the dates are relevant because if this
4 informant gave information on a daily basis which
5 was corroborated that would be something to go into.

6 I think the frequency and nature of the informa-
7 tion is relevant whether the informant was corroborated
8 as to the existence of probable cause. I move to
9 strike anything about the informant's information
10 if the Government takes the position and --

11 THE COURT: You would accept an affidavit from
12 the Government to be given to the Court in camera and
13 sealed and maintained for Appellant review?

14 MRS. ROSNER: Only on the issue of the
15 existence of the informant's life should his identity
16 be revealed. There is no way counsel could be pre-
17 cluded from going into the dates, nature of contacts
18 with the FBI -- it is only with respect to his
19 identity.

20 THE COURT: You feel you have a right to know
21 the dates?

22 MRS. ROSNER: Yes.

23 MR. WEISSWASSER: If Mr. Scotti is concerned
24 -- and I am not saying rightfully or wrongfully, about
25 the safety of the informants, I think we should have

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the dates whether these meetings were in person or telephone. The exact time if Mr. Scotti feels they shouldn't be divulged, that's all right but the dates should be given if they want to establish probable cause.

7

How do they establish probable cause --

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MR. SCOTTI: The witness testified late in October he received information, -- he received information in October which he later corroborated. The specific date doesn't make any difference to the agent's testimony or adds in any way to any possible defense that may be available.

14

He also testified that on the 15th of November he received information from this informant concerning the same premises. He testified what that information was and what he did after receiving that information. I see no benefit at all for going into the specific dates, times and places, types of communications other than what has already been testified to for purposes of this hearing.

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MR. WEISSWASSER: I haven't asked for times or places.

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25

MR. SCOTTI: Mr. Evseroff is becoming specific in his questions and I think he will be doing that from

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Nadler

2 now on.

3 MR. EVSEROFF: What Mr. Scotti is saying in
4 words or substance is that under the guise of protection
5 of the informant, we are precluded from cross-examining
6 a man whose credibility is put in issue by virtue
7 of direct testimony.

8 THE COURT: You mean the agent?

9 MR. EVSEROFF: Yes. He has testified on
10 direct examination about an informant. He has testi-
11 fied that he has spoken to this informant on a number
12 of occasions, met him on a few occasions and I think
13 on the question of believability or credibility all
14 relating to the question of probable cause, we have a
15 right to know when it was he claims that he spoke
16 to the man or woman or whoever it may be and under
17 what circumstances and what was told to him.

18 On the question of believability, on the
19 question of probable cause, I agree and I certainly
20 have not asked him anything about the identity of this
21 person nor have I asked him where he met the man or
22 when or anything of that sort. But I do believe on
23 the vast amount of discovery available in this
24 court that when someone gets on the witness stand
25 they place their credibility in issue.

Under the allegation by the Government that

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Nadler

2 their informant would be in jeopardy, you couldn't
3 preclude the cross-examination of a witness and
4 inquire into the credibility of a witness on that
5 basis.

6 It is a violation of the Constitution to do that.

7 MR. SCOTTI: I don't object if he had a conver-
8 sation with the informant, what he told him what he
9 did to corroborate that, what he did to find out
10 whether the information was reliable. All I am saying
11 is he can ask his questions regarding the informant
12 of this agent without getting into the specific dates.

13 MR. EVSEROFF: Arruendo, supposing I were to
14 ask him and you were to allow me to ask him about
15 specific dates and the records that he had would
16 indicate that on October 20 he spoke to this informant
17 when we could establish this man was in St. Louis
18 on that day, I think that would be relevant.

19 I think Mr. Scotti is suggesting to preclude
20 cross-examination with respect to the question of
21 credibility of a witness.

22 MRS. ROSNER: One other point, in describing
23 the issues at the hearing Mr. Evscroff noted we
24 are exploring the question of probable cause and as
25 the testimony came in this morning and we learned

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Nadler

2 about this late October tip I began thinking that
3 another line of argument to be advanced here is whether
4 the Government should have obtained a search warrant
5 prior to making the search because of their learning
6 of this at that particular premises.

7 THE COURT: It would be very weak at that point.

8 MRS. ROSNER: Dates being relevant. Let's
9 assume we learn on October 26th or whatever date
10 other information was given, corroborated, and so
11 on with respect to this premises up to November 15th,
12 I think it is open for counsel to argue because of
13 these contacts, warrants should have been obtained --

14 THE COURT: Maybe you should have been the
15 attorney for the Government who did that. Since
16 none of that was done, I see no reason. If you were
17 the attorney for the Government maybe that's what they
18 would have done but you weren't and, therefore, under
19 those circumstances I say no.

20 MRS. ROSNER: Counsel should be entitled to
21 explore the dates when contact was made with the
22 informant in order to advance the argument that
23 sufficient grounds existed and time existed to procure
24 a warrant either --

25 THE COURT: Listen you want explore Government's

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Nadler

2 strategy and that's Government's business.

3 MRS. ROSNER: I don't agree. It isn't a matter
4 of strategy. We have a situation where the Government
5 has shown we have information about these premises
6 at least three weeks before the final search and the
7 issue comes up whether they had ground to get a
8 warrant.

9 THE COURT: I don't agree with you.

10 MR. SCOTTI: If Mrs. Rosner is saying she should
11 have the dates, I don't feel that that in any way
12 forms any basis for justification for getting these
13 dates because there wasn't a warrant.

14 The argument is not whether or not the Government
15 should have gotten an argument. The issue that has to
16 be decided here is whether or not the warrantless
17 search was proper and legal, not whether or not the
18 Government should have gotten a warrant.

19 If that's the reason she wants these dates that's
20 no reason at all.

21 MRS. ROSNER: I wanted the record to be clear
22 because I am not sure Mr. Scotti got the thrust
23 of my remarks. It is not a matter of strategy or
24 judging the search by the fact it was warrantless.
25 An argument can be made only after we explore everything

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2 that a warrant should and could have been obtained.

3 They don't have the option there. The preference
4 of the fourth amendment is a search by warrant issued
5 by a neutral magistrate.

6 THE COURT: Your application is denied.

7 MR. WEISSWASSER: Do I understand the Govern-
8 ment's position to be that the Government is attempting
9 to justify this seizure by virtue of the fact that they
10 had a right to make an arrest at that time and it is no
11 the Government's position this was a search conducted
12 without a warrant because of the emergency and they
13 didn't have time to get a warrant.

14 MR. SCOTTI: If you are asking whether I am
15 saying this is a search incident to an arrest, that
16 is not our contention. Our contention is they had
17 probable cause to stop the truck. Once it was stopped
18 and the goods inside were identified and they
19 knocked on the door and didn't enter the premises and
20 the defendants fled out the back door leaving it open,
21 once the Government agents were standing on the premise
22 and saw the goods they had a right to go and look for
23 what was in there.

24 MR. WEISSWASSER: I don't understand Mr. Scotti'
25 objection to the dates. I don't understand your
 ruling that the dates are not important. The Governmen

1 15

Hadler

2 go into that area.

3 You may bring that in in your summation at
4 the conclusion of the hearing. If you wish you may
5 cross-examine for whatever information you may be
6 entitled to under the circumstances.

7 MR. COHEN: I have one question.

8 I was wondering, it is not beyond the realm
9 of possibility that perhaps no informant existed. That
10 is one of the bases that defense counsel has a right
11 to explore. I

12 THE COURT: If it is necessary we will put it
13 in an affidavit and the Court will seal and preserve
14 it.

15 MR. COHEN: I wonder if you would see fit to
16 question the agent in camera. If you felt --

17 THE COURT: I'd rather he put it in an affidavit
18 as to that and I will seal the affidavit and it can
19 be reserved.

20 MR. COHEN: Then the affidavit would have to
21 include not only the reason that the Government feels
22 this informant would be in jeopardy but also contain
23 facts that there is an informant.

24 THE COURT: That would be in the affidavit.

25 MR. SCOTTI: I am at a little bit of a loss why
an affidavit should be made.

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3 1 Mr. Scotti spoke about that affidavit that I
2 believe he was going to submit to your Honor and --

THE COURT: No. He is going to give me the
reports of the dates, times and places for an in-camera
inspection, not an affidavit.

7 MR. CONNELL: That's on the contact with the informant.

THE COURT: On the contact with the informant.

9 MR. COHEN: But I also understand that there
10 will be a representation in camera delivered by the
11 U.S. Attorney as to who the informer was..

12 THE COURT: I don't think that was agreed to.
13 It is just as to the dates, times and places that
14 Agent Nadler met with the informant. *

15 MR. COHEN: I wonder, in view of the many
16 decisions -- I don't think I would have made this
17 application, frankly, fifteen or twenty years ago --
18 but I think in view of the many cases that have arisen
19 both statewide and occasionally sometimes unfortunately
20 federal-wide, many judges do require that the informant
21 be named. Just -- absolutely only for an in-camera
22 inspection, just to verify the fact there was an
23 informant.

THE COURT: Well, I won't require it at this time. I will just require the dates, times and places

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
 "I am not related to the communication in October."

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
 Again, to clarify, it is a fact that you did not see this informant approximately 10 days before the 15th of November?

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
 A Yes, that is true.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
 Q You saw the informant, and that was sometime in October of 1972?

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
 A Yes, sir.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
 Q You spoke to the informant twice on the telephone thereafter?

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
 A Yes.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
 Q The last time you spoke to the informant on the telephone we have established was November 15th? The judge told us that, is that correct?

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
 A Yes.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
 Q That is the day of the search and seizure and the arrest in this case, is that correct?

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
 A Yes.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
 Q I would like to know what was the date of your telephone conversation with this informant prior to November 15.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
 A (No response.)

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
 Q If I may be permitted to know that.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
 MR. SCOTTI: I would object to that, your Honor.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
 THE COURT: Anything further on the objection?

1
2 MR. SCOTTI: Just for the reason sustained
3 yesterday, I don't think it's relevant to know the
4 exact date of communication.

5 THE COURT: I don't see it as prejudicial that
6 he knows the date. We won't permit him to go further.
7 I don't see knowing the date to be a prejudicial factor.

8 MR. EVSEROFF: I didn't ask where the call was
9 made from --

10 MR. SCOTTI: It may become -- if Mr. Evseroff
11 intends to go into the conversation, the date may take
12 on special significance which it normally would not
13 have.

14 MR. EVSEROFF: Your Honor, if we are examining
15 on a motion to suppress, the question of what probable
16 cause the agents had for going where they did and doing
17 what they did and seizing what they did, and we were
18 told on direct examination the predicate of all this
19 was an informant, I would think what we would be
20 entitled to know, what it was the informant told him
21 and when it was the informant told him these things,
22 with respect to his direct testimony in connection
23 with his activities, so that the Court might have an
24 opportunity to ascertain whether or not all of this was
25 done legally and properly and in conformance with the

1 2 cases.

3 I don't see where the United States Attorney
4 can get up and incessantly raise the scepter of security
5 with respect to the informant when we haven't asked
6 the name of the informant.

7 He had tendered this witness who testified on
8 direct examination that there was an informant. He
9 testified on direct examination that sometime in the
10 latter part of October, 1972, the informant told him
11 certain things.

12 THE COURT: Mr. Evseroff, I am disposed to have
13 him give you a date.

14 MR. SCOTTI: Your Honor, I anticipate
15 Mr. Evseroff asking, after he asked the date, if you
16 direct it be given, then he would ask what the
17 information was that the informant gave to Agent Nadler.

18 THE COURT: He will ask that anyway.

19 MR. SCOTTI: I don't object to that question.
20 The question I object to is the date of the information.
21 Mr. Evseroff certainly now at this point has a time
22 reference. He knows there were three contacts, one
23 was in October, and he has the last date. Contrary
24 to Mr. Evseroff's claims, I do have a duty to protect
25 the integrity of the informant -- not the integri

1 Nadler-cross

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2 Q He told you the location of this particular
3 drop, did he tell you what street it was on?

4 A Yes.

5 Q What street did he tell you it was on?

6 A He said in the vicinity of Metropolitan and
7 Flushing Avenues.

8 Q I see. When you went there on -- withdrawn.

9 Did he tell you what the address was?

10 A No.

11 Q Did you ask him?

12 A Yes.

13 Q What did he say?

14 A He didn't know.

15 Q Did you ask if he had ever been in this particular
16 location, inside?

17 A I don't recall.

18 Q What you are telling us with respect to the
19 substance of the conversation with this informant, am I
20 correct in assuming that you are now able to recall this was
21 as a result of perusing your notes that you made with respect
22 to your conversations with your informant?

23 A Yes.

24 Q If there was anything else contained in the
25 conversation, your best recollection would be limited by what

2 in the car?

3 A No.

4 Q It wasn't you who placed Mr. Heidel or
5 Mr. Murgatroud under arrest, you weren't there?

6 A That's correct.

7 Q You stayed at the premises?

8 A Yes.

9 MR. EVSEROFF: Your Honor, I have no further
10 questions of this witness. Thank you, your Honor.

11 THE COURT: Thank you, Mr. Evseroff.

12 We will have cross-examination by Mr. Preminger,
13 the attorney for Mr. Murgatroud.

14 I might say to all of the defense attorneys
15 as to the informant, do not ask the times of day other
16 than the time on the 15th of November, which has
17 been brought out by this witness. As to a time of
18 day of any of the other phone calls or initial meet-
19 ings, please do not ask the time of day in cross-
20 examination.

21 BY MR. PREMINGER:

22 Q Mr. Nadler, I want to bring you back in time
23 to the incident with the Dempsey dumpster.

24 A Yes.

25 Q Is that on November 10th?

8 1 Nadler-cross/Rosner

2 it's 20 minutes to 5 on Friday afternoon; do you think --

3 THE COURT: If Mrs. Rosner can finish in 20
4 minutes I will let her finish. If it's going over --

5 MRS. ROSNER: I will be done in 10 minutes.

6 THE COURT: Take five minutes.

7 (A recess was taken at this time.)

8 THE COURT: All right.

9 MRS. ROSNER: Your Honor, the defense has
10 agreed -- Mr. Evseroff and myself have agreed that we
11 would not have an objection to the agent reading so
12 much of his report that reflects what was seized on --

13 THE COURT: The items seized?

14 MRS. ROSNER: Yes.

15 THE COURT: Let him.

16 MR. WEISSWASSER: No objection to that.

17 THE COURT: Just the items seized, read it.

18 November 10th.

19 A An examination of the Dempsey dumpster disclosed
20 that the discarded empty cartons, some of which contained
21 metal bands with the address cut off, contained labels
22 reflecting the names Gemco Textile, Brooklyn, New York,
23 to Continental Piece Die Works, 15-19 First Avenue, Patterson,
24 New Jersey, Tioga Textile, 469 Seventh Avenue, New York City,
25 with No. 73 in red, Philip Kramer, Incorporated, 227 West

9 1 Nadler-cross/Rosner

2 29th Street, New York City, Tioga Textile, York, Pennsylvania,
3 Wolfberg Textile, 99 Madison Avenue, New York City, from
4 Hazleton Weaving, West Hazleton, Pennsylvania to Slatex,
5 Incorporated, 102 Madison Avenue, New York City.

6 Q Now, were these labels marked as evidence and
7 taken away from the scene?

8 A Yes.

9 Q And do you know whether they still exist and
10 are at FBI Headquarters?

11 A I don't know.

12 Q You say the Tioga labels related to some theft
13 you later ascertained after leaving the dumpster?

14 A Yes.

15 Q Let me show you what has been marked as Court
16 Exhibits 2, 3, 4, 5 and 6 and specifically directing your
17 attention to Court's Exhibit 6, that is the picture of the
18 dumpster as you found -- withdrawn.

19 That is a picture after you had emptied it on November 10,
20 correct?

21 A Yes.

22 Q Now, on that picture, Agent Nadler, the rear
23 of the dumpster appears to be open?

24 A Yes.

25 Q Now, am I correct that was the condition that

2 MR. SCOTTI: What is the Government's position?

3 MS. ROSNER: He has answered that. It is in
4 our brief. He says that the evidence was destroyed.

5 THE COURT: As I understood it, he was to check
6 and make sure.

7 MS. ROSNER: He communicated with me --

8 THE COURT: I am glad he did with you. I wa
9 him to do so on the record. He did not do it withthe
10 Court.

11 Please tell me what it is.

12 MR. SCOTTI: Agent Boling checked yesterday and
13 it appears -- it doesn't appear, the cartons that were
14 seized by the FBI in November 10, 1972 at the Dempsey
15 dumpster were destroyed.

16 THE COURT: They are no longer in the possession
17 of the FBI?

18 MR. SCOTTI: No, your Honor.

19 THE COURT: I will hear Mrs. Rosner. I wanted
20 it on the record. The record is not complete as to
21 that.

22 MS. ROSNER: Mr. Scotti also told me that the
23 labels that were seized were also destroyed.

24 THE COURT: That I want, too. I do not under-
25 stand that.

1 2 MR. SCOTTI: The labels were also destroyed.

3 4 Your Honor, I might state, it is from my
5 information that the labels and the cartons were not
6 given an FBI file number which corresponded to this
particular case.

7 8 THE COURT: To the case that is before the Court
today?

9 10 MR. SCOTTI: Yes, your Honor. They were given
another FBI file number on another investigation, which
11 did not result in an arrest or complaint or indictment
12 or any other process, and at the termination of that
13 investigation the evidence was destroyed.

14 THE COURT: Yes, Mrs. Rosner?

15 16 MS. ROSNER: Your Honor, there were also some
remarks in the record during our last session on
17 Tuesday concerning the possibility that some other
case might have been pending, that was dismissed.
18 Mr. Scotti informs me that there was no other case
19 pending or dismissed.

20 21 We cite some authority in our brief on page 11--

22 THE COURT: I do not want to get into that yet.

23 24 MS. ROSNER: On the issue of whether I rest,
your Honor, I was going to address myself to that
25 question.

1
2 THE COURT: I was going to permit you to rest,
3 unless you intend to put on evidence.

4 MS. ROSNER: Your Honor, based on the authorities
5 in our memorandum I believe that the unexplained and
6 unjustified destruction of the evidence requires that
7 that portion of the evidence relating to the events of
8 November 10th be stricken.

9 Should your Honor --

10 THE COURT: You are making a motion to that
11 effect?

12 MS. ROSNER: If I could just finish.

13 Should your Honor reject that proposition, I
14 would move for a hearing as to the reason and the
15 circumstances surrounding the destruction of the
16 evidence, relying on the Supreme Court's decision in
17 United States v. Algenbluck, and the D.C. opinion in
18 United States v. Bryant. To that extent, I do rest.

19 THE COURT: This will be something in addition
20 to what is before the Court.

21 MS. ROSNER: Yes, your Honor.

22 THE COURT: Let us finish with what is before
23 the Court now.

24 MS. ROSNER: Based upon Mr. Scotti's statement
25 to me yesterday, that there was indeed a destruction --

1
2 THE COURT: You have something else? I would
3 like to finish with what is before the Court now.

4 MS. ROSNER: There is something before the
5 Court --

6 THE COURT: It is a motion to suppress and that
7 is what I am on now. If you want another hearing at
8 any time you can ask for that.

9 MS. ROSNER: In connection with the motion to
10 suppress, I move to strike evidence of the events of
11 November 10th on the basis of Mr. Scotti's statement
12 to me that within the language of the Bryant opinion,
13 highly relevant evidence has been destroyed by the
14 Government.

15 THE COURT: Motion denied.

16 MS. ROSNER: Thank you, your Honor.

17 THE COURT: I want to know if you rest now.

18 MS. ROSNER: I take exception to your Honor's
19 ruling, that I may not have a further hearing.

20 THE COURT: I did not rule as to that, but if
21 you want it I will. Motion denied.

22 MS. ROSNER: Then I rest.

23 MR. COHEN: My defendant rests.

24 MR. WEISSWASSER: The defendant Ferrante
25 respectfully rests.

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A F T E R N O O N S E S S I O N

THE COURT: The Court will not again go over the facts in this proceeding, because the Court feels that the facts have been amply set out in the record and counsel have argued the facts sufficiently for the purposes of this proceeding and everyone, I am sure, is aware of that.

This Court finds that the search of the GGGG's truck and the arrest of the defendants Murgatroud and Heidel was entirely proper and consistent with the requirements of the Fourth Amendment.

Searches of automobiles and other vehicles have traditionally been viewed as presenting a unique Fourth Amendment problem. The Supreme Court in Carroll v. the United States, 267 U.S. 132, recognized this distinction. There it was held that a warrantless search made of an automobile carrying liquor was proper. The Court held that the search would be valid when the officer had probable cause to believe "that an automobile or other vehicle contains that which by law is subject to seizure and destruction." The Supreme Court expressly noted that the validity of such a search was not dependent on a contemporaneous arrest, Carroll v. United States, Chambers v. Maloney, 399 US 42, and Coolidge v. New Hampshire, 403 US 443 are

1 clear authority that once it had been determined from
2 previous information that the GGGG's truck did contain
3 a portion of the stolen merchandise, that the arrests
4 of Murgatroud and Heidel followed as a valid,
5 justifiable, and proper consequence of the search.
6 The Supreme Court has recognized that in those certain
7 and limited circumstances a search may precede the
8 arrest. Clearly, the exigent circumstances here
9 present were such as to make an attempt to gain a
10 search warrant a clear and practical impossibility.
11 We believe that in the face of the probable cause,
12 which the agents had, no search warrant was necessary
13 to stop the truck and the Ford, nor were arrest
14 warrants required to place Murgatroud and Heidel under
15 arrest. We find from all of the evidence adduced at
16 this hearing that the defendants Murgatroud and
17 Heidel were not under arrest, within the legal
18 meaning of that term, when the vehicle was stopped.
19 Rather, they were under "arrest" only after the
20 vehicle had been properly searched. Thus, in the view
21 of this Court the defendants were fully accorded their
22 Fourth Amendment protections.

23 As to the arrests of the defendants Vescera,
24 Lanza and Ferrante, the agents at the rear door of
25 1956 Flushing Avenue had more than probable cause to

1 arrest Vescera, Lanza and Ferrante. These agents,
2 in addition to all the previously ascertained
3 information, now knew that the GGGG's truck which
4 had been inside the premises, in fact, contained a
5 portion of the stolen merchandise in question. It is
6 also important to note that these agents observed
7 three men fleeing from the rear door of the drop after
8 being advised that other agents were approaching the
9 front door. This fact further contributed to the
10 agents' probable cause to believe that Vescera,
11 Lanza and Ferrante were fleeing the premises in order
12 to escape detection and arrest for being in possession
13 of stolen goods, knowing them to be stolen.
14 Therefore, the arrest of these fleeing individuals
15 was proper.

16 Subsequent to the arrest of Vescera, Lanza and
17 Ferrante, Agent Armstrong, while still on the public
18 sidewalk, observed through the rear door which had
19 been left open, a large quantity of cases of liquor.
20 Moreover, Agent Armstrong had no idea as to what other
21 accomplices might have remained within the drop in a
22 position to destroy evidence, to remove evidence, to
23 jeopardize the lives of agents and/or try to
24 facilitate the escape of the individuals already in
25 custody.

1 Under the totality of facts and circumstances involved.
2 it is respectfully submitted that the actions of
3 Agent Armstrong in immediately entering the premises
4 to determine whether or not other individuals were
5 present, was reasonable and proper. Speed here was
6 essential and only a thorough search of the premises
7 could have insured that no other individuals were
8 present and that the agents had control of all weapons
9 which they knew had been stolen, and which could be
10 used against them.

11 While inside the drop, the fact that stolen
12 merchandise was in plain view of Agent Armstrong cannot
13 in any way render invalid his observations of these
14 arguments and the subsequent seizure of these items
15 by himself and fellow agents. Once the agents had a
16 right to be where they were, they could seize anything
17 in plain view. The actions of the agents in this
18 case cannot be labeled as being proper or improper
19 under preconceived categories such as a search
20 incident to an arrest, or agents in hot pursuit.

21 Rather, it is the view of this court that the
22 actions of the agents must be taken in their totality
23 and viewed in light of the test of reasonableness
24 enunciated in the Fourth Amendment of the United
25 States Constitution.

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As noted above, probable cause existed for the agents to believe that stolen merchandise was contained inside 1956 Flushing Avenue. At the time when Vescera, Lanza and Ferrante attempted their escape, it would be unreasonable, dangerous and indeed could be characterized as dereliction of duty if the agents had not apprehended these fleeing individuals and immediately secured the premises to determine if any other theft was involved. Therefore, regardless of whatever label is used to generally describe the action of Agent Armstrong, the fact remains that it was reasonable and necessary under the circumstances.

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Therefore, this action should not be held to be violative of the Fourth Amendment.

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As to the motion for an order suppressing the introduction into evidence, upon the trial of this indictment, a quantity of essence oils, a quantity of watchbands, a quantity of chemicals, a quantity of cigarettes and various quantities of other miscellaneous goods and other items of personal property, if any, seized from any of the aforesaid defendants in connection with or as a result of their arrest herein, on or about the 15th day of 1972, is denied as to all defendants.

Sandidge-recross/Weisswasser

another crime --

3 MR. WEISSWASSER: If your Honor please, a side
4 bar.

THE COURT: We will have a side bar on that.

(Side bar discussion between Court and
counsel as follows:)

THE COURT: Yes sir?

9 MR. WEISSWASSER: I merely ask at this time
10 for a limited instruction to the jury that they are
11 to completely disregard and gather no inference from
12 that statement by the agent as to these defendants
13 or my client.

14 THE COURT: Anything, Mr. Cohen?

15 MR. COHEN: Just that.

16 MR. SCOTTI: Is defense counsel waiving the
17 opportunity to make a motion for a mistrial?

18 MR. WEISSWASSER: I am, but I would ask your
19 Honor to instruct the witness not to make gratuitous
20 statements.

21 MR. SCOTTI: I understand that the comment
22 was not proper but it was in response to a question
23 asked by Mr. Weisswasser with a smile on his face
24 while trying to get a point across to the jury. The
25 question was asked repeatedly. It was wrong for him

Sandidge-recross/Weisswasser

2 to make the statement, no question, but I submit it
3 is not gratuitous.

4 MR. WEISSWASSER: I called for a yes or no
5 answer.

6 THE COURT: Well, you have been going at the
7 witness and he just came out with it. I don't think
8 it was intentional.

9 MR. WEISSWASSER: I think he knows better.

10 THE COURT: Possibly.

11 (Conclusion of side bar discussion.)

12 (Following held in open court.)

THE COURT: Ladies and gentlemen of the jury,
the Court requests that you disregard the last
statement that the witness made, that the item was
evidence of some other crime. There is no inference
or presumption that these individuals on trial were
involved in any other crime and if they are involved
in this one, that you should find for yourselves.

Just as there is no inference or presumption
that these individuals were responsible for the theft
at the Airfreight warehouse there is to be no
inference or presumption that they were involved in
another crime.

25 You may proceed, Mr. Weisswasser.

2 (The trial continued with the presence of the
3 jury.)

4 MR. WEISSWASSER: Good morning, your Honor.

5 THE COURT: Good morning.

6 MR. SCOTTI: Good morning, your Honor.

7 THE COURT: Good morning.

This is an application for a protective order.

9 Let the record indicate that Mr Weisswasser has
10 just handed up a two page affirmation to the Court in
11 connection with this matter.

12 Have you just received a copy, Mr. Scotti?

13 MR. SCOTTI: Yes, I did.

THE COURT: Just this moment?

15 MR. SCOTTI: About a minute before thirty
16 seconds before you came out to the courtroom.

17 THE COURT: I will hear you, Mr. Weisswasser.

18 MR. WEIGSWASSER. If your Honor pleases, this is
19 an application for a protective order that in the
20 event the defendant Anthony Ferrante takes the stand
21 in his own defense that the Government be precluded
22 from inquiring into his one and only conviction, that
23 being a misdemeanor conviction for third degree
24 possession of stolen property.

In this conviction, the defendant pleaded in 1971

1 and was sentenced to three years probation in 1971,
2 and the conviction was based upon an act which took
3 place in 1968.

4 I submit to the Court that the only possible
5 reason to go into that since character is not going to
6 be put into issue, your Honor, character will not be
7 put in issue in this case, will be the credibility of
8 the defendant upon the stand and just as any other
9 witness' credibility is put into issue.

10 Your Honor, to permit the Government to use this
11 issue in this regard is far -- well, the probative
12 value of that matter will be far outweighed by the
13 prejudice which will accrue to the defendant on a
14 matter and incident which took place some seven years
15 ago.

16 Certainly granting that it is a similar incident,
17 an incident of a similar nature, then why do I say
18 that the probative value is so far outweighed by the
19 prejudice, and that is because the jury has not been
20 trained in legal niceties and no matter what
21 instruction your Honor gives the jury that they are not
22 to consider or to take into consideration that in
23 establishing his guilt in this matter, that he had a
24 prior conviction, but only in weighing his
25 credibility, well, I don't think the jury, just as most

1 lawyers and judges have difficulty separating the two
2 concepts, judges being trained as they are and those
3 of us who work in the criminal court system every day
4 understand the niceties and what the probative value
5 is and we understand what the instructions should be,
6 but I submit that a defendant runs a very, very real
7 risk, and the Court would by denying this application
8 place the defendant in very serious jeopardy of being
9 convicted on this charge because once before he was
10 convicted on a similar charge.

11 Your Honor, if the defendant had to take that
12 risk, if your Honor denies the application, I will not
13 be able to put the defendant on the stand, and in fact
14 -- I don't blame the Court and I don't mean to
15 insinuate that it is the Court's fault -- but the
16 defendant would really be denied the right of
17 testifying in his own behalf because he could not run
18 that risk and I would not allow him or advise him,
19 I would tell him not to take the stand. But, your
20 Honor, he wishes to take the stand and if he takes the
21 stand he will testify as to his innocence and as to
22 his innocent presence at the scene.

23 THE COURT: Yes, Mr. Scotti?

24 MR. WEISSWASSER: Your Honor, this application
25 is made so the record will know under Rule 403 which

1 federal rules of evidence.

2 MR. WEISSWASSER: Well, Judge --

3 THE COURT: Thank you, Mr. Scotti.

4 Yes, sir?

5 MR. WEISSWASSER: May I just be heard
6 momentarily?

7 I don't know that I should be glad or sad that
8 that is Mr. Scotti's position because I really felt
9 that if the Government were going to point to any
10 legitimate purpose at all it would be the impeachment
11 of credibility.

12 The Government now states what clearly is the
13 reason they wish to question Mr. Ferrante, and that is
14 to show prior similar acts, and I submit to your Honor
15 that would clearly be improper in this case.

16 It is not a question of prior similar acts
17 because Mr. Ferrante acknowledged his guilt. That was
18 in 1968. He knowingly possessed, and I think in that
19 case it was some --

20 THE COURT: Maybe I should take a look at the
21 rule and check it.

22 MR. WEISSWASSER: If your Honor would just hear
23 me momentarily, I am not going to cover the old ground
24 I want to say something new.

25 In 1968, he knowingly took some twenty or thirty

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1 pairs of shoes. He knowingly possessed that and
2 admitted his guilt.

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4 (continued next page)

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THE COURT: Of course you can also appreciate
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that this Court has a certain history with Mr. Ferrante
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in that he was recently tried and in that case I did
6
not permit this prior similar act to come in, you must
7
appreciate that there is a history here that is very
8
disturbing to the Court, it is very disturbing because
9
the Court cannot continue to overlook the fact of Mr.
10
Ferrante's possessive actions.

11
I am not saying that he is guilty or he is not
12
guilty, but you have got to appreciate the Court's
13
position.

14
15
MR. WEISSWASSER: I would most respectfully point
16
out to the Court that the prior trial, although coming
17
prior in time --

18
19
THE COURT: If I had permitted it in that trial,
20
that is the use of this situation, Mr. Ferrante might
21
have had another problem.

22
Now it was a different problem in the other
23
trial, that is was the Government took that position.

24
25
MR. WEISSWASSER: It was a different problem in
the other trial?

26
27
THE COURT: Of course there are actions here
28
which are before the Court and the Court is not looking
29
with blindness at what is happening here.

30
31
MR. WEISSWASSER: I'm sure not but I wish your

1 THE COURT: All right, on the motions by Mr.
2 Weisswasser and application for a protective order,
3 the application for a protective order brought on by
4 Mr. Ferrante to preclude the Government from any
5 line of questioning regarding the defendant's prior
6 conviction should the defendant take the stand in his
7 own defense is denied. Under Rule 404, evidence of
8 other crimes, wrongs or acts is not admissible to
9 prove the character of a person in order to show
10 that he acted in conformity therewith.

11 However, under Rule 404, evidence of other
12 crimes may be admissible for other purposes, such
13 as proof of motive, opportunity, intent, preparation,
14 plan, knowledge or absence of mistake or accident.

15 Here the Court finds that the probative value
16 of such evidence clearly outweighs any possible
17 prejudice to the defendant. The Court also notes
18 in passing that the arrest in 1968 is not so far
19 remote in time from the transaction set forth in
20 this indictment as to be excludable because of any
21 claim of remoteness by the defendant.

22 Accordingly, the defendant's application for
23 a protective order is denied and the Government may
24 consistent with Rule 404B, over such prior similar
25 act evidence. That is the Court's decision.

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